Supreme Court, U.S.
FILED
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No. 01-29

IN THE

Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER and DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6 AND PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6, respondent The Procter & Gamble Company states that it is a publicly traded corporation with no parent corporations and that no publicly held company owns 10% or more of its stock. Respondent The Procter & Gamble Distributing Company is a wholly owned subsidiary of The Procter & Gamble Company.

Furthermore, petitioners purport to list defendants below who are not among the petitioners. Their list is incomplete. The court of appeals reversed the dismissal of claims that were asserted not only against petitioners/defendants/ appellees Amway Corporation, Randy Haugen, Randy Walker, Dexter Yager, Sr., and Donald R. Wilson, but also against Ja-Ri Corporation, Amway Distributors Association Council, and Internet Services Corporation, who are not among the petitioners.

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INTRODUCTION

Petitioners seek review of the Fifth Circuit's decision reversing the dismissal of respondents' Lanham Act Section 43(a) claim and remanding the case for further proceedings, including fact-finding to determine whether the "actual malice" standard applies in this case. Respondent Procter & Gamble Company ("P&G") seeks to hold petitioners liable for the dissemination of an irresponsible, fabricated rumor linking P&G, their chief competitor, with the Church of Satan and Satanic worship.

Petitioners cite as reasons for granting review: (1) "conflict," "confusion," and "uncertainty" among the courts of appeals caused, they say, by the "inconsistency and indeterminacy" of this Court's "commercial speech" decisions (Petition, pp. 1, 7); (2) the Fifth Circuit's "perverse" total reliance on the speaker's "subjective" "economic motivation" in deciding whether the "actual malice" standard applies (*id.* at 6, 15-17, 27); and (3) the notion that this case involves an expression of religious conviction that must be protected under the First Amendment (*id.* at 17, 19). Like petitioners' rumor that lies at the heart of this case, their reasons are wholly fictitious.

There are no genuine disagreements of significance among the courts of appeals; the Fifth Circuit properly applied the correct definition of "commercial speech" prescribed by this Court; and the "expression" on which petitioners base their First Amendment argument was nothing more than a blatant commercial pitch vilifying a competitor and urging recipients to buy Amway products only and, thereby, to foster the Amway business. Its false and venomous content bears no resemblance to a statement of religious conviction or to any other form of protected speech. Nothing in this case warrants this Court's attention and review should be denied.

STATEMENT OF THE CASE

P&G, a consumer goods manufacturer, brought this action against Amway Corporation ("Amway"), certain key Amway distributors, and the Amway Distributors Association Council ("ADAC") challenging defendants' fraudulent and deceptive marketing practices. These practices include falsely associating P&G and its products with Satan ("the Satanism rumor"), falsely claiming that use of certain P&G products would injure consumers or damage their property ("the product disparagement"), and fraudulently inducing individuals to participate in a pyramid distribution system by promising that they would become wealthy if they became Amway distributors, bought Amway products and motivational tools, and recruited others to do the same ("the pyramid scheme").

P&G and Amway are manufacturers of household products such as laundry detergent, toothpaste, and cleaners. Trial Transcript ("T.T.") 403. P&G is Amway's primary competitor. P&G Trial Exhibit ("T.E.") 1310, pp. AMT40568, AMT40576, AMT40580. Founded in 1837, P&G sells products such as Tide laundry detergent, Crest toothpaste, Folgers coffee, Pringles snacks, Cascade and Dawn dishwashing products, Pampers diapers, and Ivory Soap at retail grocery stores, drug stores, and mass merchandisers. Compl.; T.E. 235.

Founded in 1959, Amway sells its products only through individuals who are recruited as "distributors." T.E. 63, 1605, 1892. Distributors are urged continuously to recruit others to join the pyramidal chain of "downline" distributors. P&G Summary Judgment Opposition ("MSJ Opp."), Exh. A50, p. 104 (Doc. 278-84); T.E. 438, 1892, p. AM0023683. Amway has approximately one million United States distributors; at least 400,000 leave the organization each year. T.T. 1712. Thus, Amway distributors must recruit

continuously to sustain the pyramid structure. A distributor's primary purpose is to recruit more distributors and to sell them "motivational" tapes produced by high-level distributors and tickets to Amway "rallies." MSJ Opp., Exhs. A50, p. 104, A53; T.E. 1892, pp. AM0023683, AM0023692, AM0023695. Distributors are told not to sell Amway products to consumers, but only to themselves and other distributors. MSJ Opp., Exh. A50, pp. 23, 36. More than 73% of the distributors make no sales outside Amway. *Id.* at Exh. A59, pp. AMT035628, AMT035631. Only 12% of Amway product sales are outside Amway, *id.* at p. AMT035636; the remaining 88% of sales take place within the Amway distributor organization. *Id.*

A. The Satanism Rumor

In the early 1980s, P&G began receiving reports that Amway distributors were circulating the Satanism rumor. T.E. 671, 753. The rumor falsely related that P&G's president had stated on a well-known TV talk show that he had decided to admit that he worshiped Satan and that a portion of P&G's profits were given to the Church of Satan. T.E. 274, 327-29, 331, 333, 335, 337, 338, 342; MSJ Opp., Exhs. A3, A5, A6. The rumor falsely attributed to the president a lack of concern whether consumers knew of the association between P&G and Satanism, fabricating a quote from him saying "there are not enough Christians in the United States to make a difference." *Id.* The rumor, usually in a written flier, listed more than 40 P&G products and called for a boycott. *Id.* It told recipients to check products for a moon and stars logo, which is P&G's trademark, falsely stating that it is a Satanic symbol. *Id.* A high-level Amway distributor once told an Amway rally:

> Well, let me tell you what the President of Procter & Gamble said on the Donahue Show . . . nationwide television. He said he works with

> Satan. . . . He said "there ain't enough Christians in this country to hurt me." (loud murmurs from crowd). And let me tell you what else he said, he said Satan's signature is on every . . . Procter & Gamble product . . . . For you know about the President of Procter & Gamble on the Donahue show telling a hundred and forty million people that "I worship SATAN!" You didn't even know about it! And it's a fact! It's true! I couldn't set [*sic*] up here and say it's true if it wasn't true, and it's true!

MSJ Opp., Exh. A6.

The Satanism rumor is a complete fabrication. *Id.* at Exh. A86; T.E. 235. P&G's president has never been on the Donahue Show. Neither its president, nor any other P&G representative, has ever made statements associating P&G with the Church of Satan. *Id.* P&G has never donated money to anything affiliated with a Satanic church. *Id.* In fact, P&G's logo of the "Man in the Moon" and stars was adopted more than a hundred years ago to distinguish P&G's goods, using then-popular symbols, at a time when many vendors, purchasers, and others who handled goods were unable to read. *Id.* The trademark symbolizes the high quality of P&G products. T.E. 936. Amway has admitted that the Satanism rumor is "false," "malicious," and "vicious." MSJ Opp., Exhs. A36, A17; T.E. 615, 946, 1490.

Although it could have, Amway did not take effective measures to stop its distributors from spreading the rumor. *Id.* at Exh. A23; T.E. 788 (Amway was advised internally to deny the rumor to all distributors every six months, due to the "passing parade of distributors," but it refused). Consequently, distributors continued to spread the rumor throughout the 1980s and early 1990s. MSJ Opp., Exhs. A7, A13, A20, A21, A37, A81.

In April 1995, a major outbreak of the Satanism rumor occurred when Executive Diamond distributor Randy Haugen broadcast an audio version of it on Amway's "AMVOX" telephone message system, which interconnects virtually the entire Amway system. *Id.* at Exh. A5; T.E. 19.[1] Preceded by the recorded voice of Haugen telling distributors "This is Randy. Double your numbers," the audio version of the rumor gave a new date for the imaginary Donahue Show appearance, March 1, 1995. *Id.* It named 44 P&G products, urged a boycott of them, and invited recipients to call the Donahue Show for a transcript of the interview. *Id.* Then it added:

> I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from.

Id.

Haugen never presented this as a rumor. To the contrary, he told the distributors this was a "great message." *Id.* He sent the message to his "frontline" distributors in Utah, Arizona, Minnesota, Oregon, California, and Texas. T.T. 1780-84. It proceeded through Haugen's network of distributors. T.T. 1856; T.E. 1487. One distributor two levels below Haugen on the pyramid, who testified that distributors were taught to "edify" their "uplines" and never question

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1. Amway's elite Direct Distributors are ranked in ascending order: Pearl, Ruby, Emerald, Diamond, Double Diamond, and Executive Diamond. T.E. 63, pp. AM2825-AM2831. Haugen was and still is at the highest level of the pyramid.

them, sent the message to 200-300 distributors downline from him. T.T. 1856. Another distributor forwarded the message with the comment that it was "just really phenomenal. I think it would benefit everybody." MSJ Opp., Exh. A5; T.E. 19. Internal Amway documents state that the rumor was "running rampant" in Haugen's group, which consists of more than 100,000 distributors. *Id.* at Exh. A19; T.T. 1773, 1863; T.E. 1550, 2350. At that point, not only was the Satanism rumor coming from the highest levels of Amway, it literally was cascading around the country.

Other Amway representatives circulated a written version of the rumor in 1995, appending to it a cover page showing a skull and crossbones, a symbol indicating "thumbs down" on "all P&G products," and the Amway representatives' telephone numbers, with the statement: "We offer you an alternative." MSJ Opp., Exhs. A3, A4; T.E. 1537A. One distributor admitted she used the Satanism rumor to recruit others to join Amway and sell its products. MSJ Opp., Exh. A4.

After learning of Haugen's widespread transmission of the rumor, Amway considered telling its distributors that it was false, but decided not to do so. *Id.* at Exh. A22; T.E. 1546. Haugen sent another AMVOX message purporting to retract the rumor, but an internal Amway document reveals that a month later the company knew the retraction did not reach everyone who received Haugen's original transmission. T.E. 1620. In fact, Amway learned Haugen's message had spread into other large distributor organizations. *Id*; T.E. 1564. Nevertheless, Amway did not send a message to distributors informing them that the rumor was false until after P&G initiated litigation. MSJ Opp., Exh. A83.

Amway's rules authorize it to terminate or discipline distributors for improper conduct, T.E. 63, 265 (distributor terminated for disparaging competitor's product), but

the company has never disciplined any distributor for spreading the Satanism rumor. Rather than punish Haugen, Amway awarded him its prestigious Founders Achievement Award bonus of $25,000 in 1995 for conduct that Amway characterized as ethical. T.E. 1451, 1651.

The Satanism rumor has resulted in thousands of consumers calling or writing to P&G, many stating they were appalled or outraged and no longer would purchase P&G products. MSJ Opp., Exh. B1; T.E. 123, 208, 1600, 1603, 2351. In April and May 1995 alone, more than 5,000 people contacted P&G about the Satanism rumor; this is precisely when Haugen's message was running rampant. T.E. 111, p. B001501. P&G's expert economist calculated that from March 1995 to August 1997, P&G lost sales on Tide, Pampers, and Crest totaling $49.5 million due to the rumor. MSJ Opp., Exhs. A11, A12. Amway itself admits it has "cost P&G millions to fight this rumor." *Id.* at Exh. A9; T.E. 1047.

B. The District Court Proceedings

P&G filed its initial complaint on July 16, 1997 (Doc. 1). In its Second Amended Complaint, P&G alleged claims including violation of Lanham Act Section 43(a), 15 U.S.C. § 1125(a),[2] defamation, violation of the Racketeer

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2. In relevant part, Section 43(a) of the Lanham Act makes actionable any "false or misleading representation of fact" by "any person" "which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities . . . ." A plaintiff may base a claim on the "goods" prong, the "services" prong, and/or the "commercial activities" prong of Section 43(a), and it may allege that the defendant misrepresented the plaintiff's and/or the defendant's goods, services, or commercial activities. In this action, P&G invoked the "goods" and "commercial activities" prongs and alleged that defendants misrepresented not only P&G's goods and commercial activities, but their own as well.

Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), and violation of Texas Business & Commerce Code Section 16.29, which provides for injunctive relief. The complaint sought to impose direct liability on the defendants who actually disseminated the Satanism rumor (Haugen, Walker, and some of their "downlines") and vicarious liability on those who had control over the disseminators (Amway, Haugen, and other high-level distributors). The district court dismissed, *inter alia*, the RICO claims under Rule 12(b)(6), Order, November 12, 1998 (Doc. 156), and later denied reconsideration. Order, February 12, 1999 (Doc. 245).

On two occasions before trial, Amway requested a stay, arguing that this action was identical to one P&G had filed in the United States District Court in Utah against Amway and certain distributors based solely on their 1995 dissemination of the Satanism rumor.[3] The Texas district court denied a stay because the Texas action involved parties and claims that were not in the Utah case. Orders, January 5, 1998 and November 12, 1998 (Doc. 77 and 156). The Utah action was dismissed on April 1, 1999.[4] On April 7, 1999, Amway moved for leave to seek summary judgment as to the entire Texas action on the ground the Utah court's decision was *res judicata*. Motion for Leave to File Supplement to Motion for Summary

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3. P&G filed the Texas action after two defendants, both Texas residents, sought dismissal from the Utah action for lack of personal jurisdiction. The latter action did not include any claims based on product disparagement, the pyramid scheme, RICO, or Texas law, or any Lanham Act claim based on Amway's misrepresentations about its own commercial activities.

4. P&G appealed to the Tenth Circuit on April 2, 1999. On August 23, 2000, the Tenth Circuit reversed the dismissal of P&G's Lanham Act claim and state tortious interference claim. *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000).

Judgment (Doc. 296, 300). The district court denied the motion. Order, April 16, 1999 (Doc. 304).

Trial commenced on May 3, 1999 and continued for two weeks. On May 13, 1999, after P&G rested, defendants moved for judgment as a matter of law under Rule 50(a) ("JML") (Doc. 409, 410, 414). The district court ruled that P&G was required to prove actual malice as an element of its Lanham Act claim, T.T. 2274, but held that P&G had offered sufficient evidence of actual malice to permit the claim to go to the jury and rejected that as a ground for JML. *Id.* at 2307.

In its Rule 50(a) motion, Amway reasserted *res judicata* as to the entire action (Doc. 410). P&G pointed out that the court previously had denied Amway's request for dismissal on that basis. T.T. 2107. However, the court indicated it had not ruled on the merits of the *res judicata* argument and deferred consideration of it until defendants rested. T.T. 2107-08. By that time, the only remaining claims were the Lanham Act Section 43(a) claims based on the Satanism rumor and product disparagement and the claim for violation of Texas Business & Commerce Code Section 16.29.[5] The remaining defendants were Amway and high-level distributors Randy Haugen, Randy Walker, Dexter Yager, and Donald Wilson. P&G had presented sufficient evidence to hold Haugen and Walker directly liable for disseminating the Satanism rumor, Amway directly liable for product disparagement, and all of them vicariously liable for the dissemination of the Satanism rumor by their "downline" distributors.

Defendants rested on May 14, 1999 and closing arguments were scheduled for the following Monday, May 17. The court interrupted the schedule, however, to conduct

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5. The district court granted JML on the defamation claim on grounds unrelated to actual malice (*e.g.*, statute of limitations).

what became a two-day hearing on *res judicata*. At its conclusion on May 15, 1999, the court issued three rulings disposing of the claims that had survived defendants' Rule 50(a) motion two days earlier. First, the court held that *res judicata* barred *direct* liability against Amway, Haugen, and Walker. T.T. 2766. Second, the court concluded that P&G had *not* presented sufficient evidence of actual malice to hold defendants *vicariously* liable for the dissemination of the Satanism rumor *by the "downline" distributors*. T.T. 2838-39. Third, the court dismissed the Section 16.29 claim without stating a reason. *Id.* The court entered final judgment against P&G. Amended Final Judgment (Doc. 425). P&G filed a timely notice of appeal on June 15, 1999 (Doc. 447).

C. The Court of Appeals Decision

Because the Tenth Circuit reversed the Utah judgment in *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000), the Fifth Circuit reversed the district court's decision according preclusive effect to that judgment. App. 13a, 54a. It also reversed the district court's decision requiring P&G to prove actual malice, holding instead that on remand the district court would have to make further factual findings, dictated by this Court's "commercial speech" cases, in order to determine whether P&G is required to satisfy the "actual malice" standard.[6] App. 16a-35a. The court of appeals also denied a petition for panel rehearing and rehearing *en banc*.

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6. The Fifth Circuit also held that the district court erred in dismissing P&G's Lanham Act claim based on Amway's disparagement of Crest toothpaste, App. 51a-52a, P&G's fraud-based RICO claim, *id.* at 50a, and its injunctive claim under Texas Business & Commerce Code Section 16.29, *id.* at 51a-52a. Because the Petition does not challenge the Fifth Circuit's grounds for reversing those dismissals, we do not address them in this Brief.

REASONS FOR DENYING THE WRIT

I. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER THE PROPER TEST FOR DETERMINING IF A SPECIFIC INSTANCE OF SPEECH IS "COMMERCIAL." THE FIFTH CIRCUIT'S THREE-PART TEST IS COMPLETELY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OF THE OTHER COURTS OF APPEALS THAT HAVE ADDRESSED THE SAME ISSUE.

Petitioners feign the existence of "confusion," "uncertainty," and "conflict" among the courts of appeals over the proper test for determining if specific speech constitutes "commercial speech." Petition, pp. 1, 7-8.[7] In an attempt to attract this Court's attention, petitioners argue that the Court must reconcile the "three different tests for determining whether speech is 'commercial.' " *Id.*, citing, *inter alia*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S. Ct. 1817 (1976), *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 564, 100 S. Ct. 2343 (1980), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875 (1983). A review of recent decisions by the circuits in question reveals that there is no meaningful uncertainty concerning the proper test for determining whether particular speech is "commercial."

At various points, petitioners imply that the Fifth Circuit held that a speaker's subjective economic motivation alone can determine whether the "actual malice" standard applies.

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7. Petitioners displayed no such "confusion" before the district court, citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875 (1983) as the source for the definition of "commercial speech." Amway Corporation's Motion for Summary Judgment, p. 36.

Petition, p. 27 ("When that court's two holdings are combined, speech at the *core* of the First Amendment can be deemed 'commercial' based on the speaker's motivation, and then deprived of all First Amendment protection for that reason alone."); *see also* Petition, pp. 6, 15, 16. These characterizations distort the Fifth Circuit's opinion by leaving the misleading impression that it failed to consider other factors it was required to weigh. App. 24a-27a.

A. The Fifth Circuit Properly Applied The Test Prescribed in *Bolger*.

The court of appeals held that the "actual malice" standard would not apply if the Satanism rumor constitutes "commercial speech." App. 35a. In determining if the Satanism rumor constitutes commercial speech, the Fifth Circuit began by noting the "core notion" of commercial speech first described in *Virginia State Bd.*, *supra*, 425 U.S. at 762, namely "speech that merely proposes a commercial transaction." App. 18a. Acknowledging that this "core notion" has not been treated as the sole embodiment of commercial speech, *Bolger*, *supra*, 463 U.S. at 66, the Fifth Circuit compared the two salient variants of Amway's Satanism rumor (*i.e.*, the fliers and the AMVOX message) with this Court's broader, more detailed descriptions of commercial speech. App. 20a-24a. The court of appeals carefully compared Amway's versions of the rumor to the four characteristics of prototypical commercial speech that, according to this Court, make it amenable to limitation. *Id.* These characteristics are precisely the same ones that the Third Circuit used in *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 933-37 (3d Cir.), *cert. denied*, 498 U.S. 816, 111 S. Ct. 58 (1990), to determine if the speech at issue in that case was "commercial." *Id.* at 20a-21a.

Finding that it could not determine from these characteristics whether the Satanism rumor was commercial

or noncommercial speech, *id.* at 24a, the Fifth Circuit turned to the three-part *Bolger* test, which this Court adopted and consistently has used to determine if "a specific instance of speech is commercial":

> (i) whether the communication is an advertisement, (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.

Id. at 24a (citing *Bolger*, *supra*, 463 U.S. at 67).

Contrary to petitioners' characterization, the Fifth Circuit did not "employ[ ] a loose variant of the *Bolger* test." Petition, p. 9. True to *Bolger*, the court did not treat any single factor as determinative, but analyzed all of them within the limited record before it. App. 24a-28a. The Fifth Circuit "easily" found that the fliers containing the Satanism rumor and listing P&G's products, which Amway distributors printed and gave to customers, clearly satisfied all three factors and, thus, constituted commercial speech. *Id.* at 24a n.25.

The court of appeals found defendants' AMVOX version of the rumor more difficult to analyze only because of the limited record before it. App. 24a-25a. Concluding that the second *Bolger* factor (*i.e.*, product references) was "easily satisfied," *id.* at 25a, the court observed that "[t]he first factor . . . seems to collapse into the third factor in this case," and the third factor "has not yet been decided by the trier of fact, so we remand for that to be done." *Id.* Thus, the Fifth Circuit indicated that evidence could be adduced to help the trier of fact determine whether Haugen's AMVOX version of the rumor was commercial or noncommercial speech. *Id.* at 27a-28a. If ultimately classified as commercial, the "actual malice" standard would not apply; if noncommercial, it would apply. *Id.* at 33a-35a.

Thus, contrary to petitioners' characterization, the court did not disregard or relax any of the *Bolger* factors. As to the written fliers, the court mentioned each factor individually and explained why each was satisfied. The only difference in its analysis of the AMVOX message was that it deemed the current record insufficient to apply the third factor with certainty and was unwilling to surmise petitioners' motivation absent a factual finding. Thus, the remand was completely appropriate and renders review at this juncture completely premature. *See* Section III, *post*.

B. The Courts Of Appeals Are Not Split Over The Propriety Of Considering A Speaker's Economic Motivation. Indeed, *Bolger* Mandates It.

Even though *Bolger* held that economic motivation, in combination with the other two factors, must be used to decide if specific speech is "commercial," petitioners challenge the Fifth Circuit's consideration of that factor in determining whether the "actual malice" standard applies.[8] Constructing a classic "straw man," petitioners recast the Fifth Circuit's careful analysis of the third *Bolger* factor and accuse that court of elevating it to preeminent status. They argue that treating the speaker's economic motivation as determinative conflicts with decisions of the Seventh and Ninth Circuits, and further suggest that those circuits have applied only the "core notion" of "commercial speech" (*Virginia State Bd., supra*) in their decisions. Petitioners even hint that those circuits have applied the "actual malice" standard to speech that the Fifth Circuit would consider "commercial" under the *Bolger* test.

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8. The Tenth Circuit also applied the *Bolger* test, including the third factor, to the very same AMVOX message. *Procter & Gamble Co. v. Haugen*, *supra*, 222 F.3d at 1274.

1. A review of the Seventh and Ninth Circuit opinions cited by petitioners and of the Fifth Circuit's decision shows no salient difference in the way those courts determine "commercial speech" and demonstrates that the law on this subject is not in disarray, confusing, or in need of this Court's intervention.

Petitioners argue that the Fifth Circuit's decision cannot be reconciled with *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986). In *Woods*, the Seventh Circuit acknowledged that Indiana case law required application of the "actual malice" standard to the defendant newspaper's allegedly defamatory column. *Id.* at 483. In response to the plaintiff television station's contention that it was the defendant's competitor and that the First Amendment would not protect "commercial defamation," the Seventh Circuit responded simply that "[t]he present case is governed by state, not federal law," and that state law made no exception for defamatory statements by competitors. *Id.* at 484. Thus, the Seventh Circuit's observation, in *dictum*, that "the June 22 column simply cannot be characterized as commercial speech," *id.*, was not a pronouncement on the scope of the First Amendment's protections, much less a signal that the Seventh Circuit rejects (as, of course, it cannot) the *Bolger* test (or at least its third factor) and limits commercial speech to *Virginia State Bd.'s* "core notion." Indeed, even before *Bolger* was decided, the Seventh Circuit correctly predicted that this Court would not limit commercial speech "to the mere proposal of a particular commercial transaction . . . ." *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157, 163 (7th Cir. 1978).

Petitioners point to *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999), as proof that the Ninth Circuit has refused to apply *Bolger's* test for commercial speech. Although petitioners candidly admit that

the *Thomas* panel opinion was superseded by an *en banc* decision, 220 F.3d 1134 (9th Cir. 2000), and thus represents only "persuasive authority" in the Ninth Circuit, the rest of their characterization of the vacated opinion is less than candid. Although that opinion interpreted *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505 (1993), as casting doubt on *Bolger* (*see Thomas* panel opinion, *supra*, 165 F.3d at 710), it nonetheless articulated the *Bolger* test clearly and applied it easily, concluding that all three *Bolger* characteristics were absent and, thus, the speech could not be considered "commercial" under this Court's test. *Id.* at 710-11.

Other Ninth Circuit decisions have applied *Bolger's* commercial speech test just as easily and without hesitation, confusion, or uncertainty. *See, e.g., Association of National Advertisers v. Lungren*, 44 F.3d 726, 728-29 (9th Cir. 1994). Other court of appeals decisions applying the *Bolger* test — many of which petitioners cite — display none of the doctrinal confusion claimed by petitioners. *See, e.g., Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999) (applying *Bolger* in a Lanham Act case); *Semco v. Amcast*, 52 F.3d 108, 112-13 (6th Cir. 1995); *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority*, 148 F.3d 242, 247 (3d Cir. 1998); *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87, 97 (2d Cir. 1998). In short, there is no doctrinal confusion in existing jurisprudence and no reason to grant certiorari in this case.

2. The Fifth Circuit decision did not elevate "economic motivation" to preeminent status among the three *Bolger* factors.

Petitioners contend that the Fifth Circuit distorted *Bolger* by placing undue emphasis on the speaker's "economic motivation," which they suggest creates a division among

the circuits. They seem to contend that, because the court of appeals was not convinced that the AMVOX message satisfied the first *Bolger* factor (it "was not an advertisement in the classic sense," App. 25a), the court's conclusion that the message still could be commercial speech meant that it was improperly treating the third *Bolger* factor as preeminent.

Petitioners have no basis for that characterization, much less their suggestion of a disagreement among the courts of appeals. The Fifth Circuit stated that the speaker's economic motivation is "determinative" in the context of this case merely because "the other two *Bolger* factors are not conclusive." App. 27a. That is, the court found the second factor (product references) clearly satisfied, but believed the first factor (advertisement) may or may not be met, depending on the resolution of the third factor (economic motivation), which made remand necessary.[9] The Fifth Circuit did not rule out that the AMVOX message could be deemed an advertisement on remand, after further factual development. App. 25a. To the contrary, it stated explicitly that, depending on the resolution of the "economic motivation" factor when the case returns to the district court, the message "could be considered as a negative advertisement against P&G . . . ." *Id.*[10] Thus, petitioners' argument mischaracterizes the Fifth Circuit's application of the *Bolger* factors in an attempt to

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9. The Fifth Circuit made a special point to "stress that we are not shortening the *Bolger* test to a single factor . . . ." App. 26a-27a.

10. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S. Ct. 1912, 1919 (1978) (expression concerning commercial transactions may constitute "commercial speech" warranting less constitutional protection, notwithstanding that it is carried out in a more limited or private setting; it actually may be more harmful to the public's interest in the "free flow" of truthful "commercial information" than that which takes place through an open, public advertisement).

create the appearance of a disagreement among the circuits.[11] Indeed, the Fifth Circuit's treatment of this point demonstrates how unique and fact-dependent this case is and illustrates why review by this Court is inappropriate.

3. The Fifth Circuit decision does not require intrusive inquiries that could encroach on a speaker's freedom of conscience.

Petitioners object to the Fifth Circuit's emphasis on *Bolger's* "economic motivation" factor because they claim that it forces a speaker to "endure" "an intrusive inquiry into [his] subjective motivations" that inevitably invades "his freedom of conscience . . . ." Petition, pp. 13, 17. Again, in order to attract the Court's attention, they suggest that this is a new requirement that creates a division among the circuits.

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11. Even beyond their argument's factual inaccuracy, it is inconsistent with *Bolger*. It suggests that a court could not conclude properly that the AMVOX message was commercial speech unless convinced that it was an "advertisement," a term that petitioners apparently interpret only in its narrow traditional sense. Petition, p. 12 (accusing the Fifth Circuit of detaching the commercial speech doctrine from "its advertising moorings"). In *Bolger*, the Court set forth three "characteristics" of commercial speech, adding that "the combination of *all* these characteristics . . . provides strong support" for concluding that the speech is commercial. *Bolger*, *supra*, 463 U.S. at 67 (emphasis original). The Court made it clear, however, that not every characteristic "must necessarily be present in order for speech to be commercial." *Id.* at n.14. Thus, the court of appeals did not depart from *Bolger* by concluding that the AMVOX message could be commercial speech even if not an advertisement in the traditional sense. App. 25a. Indeed, it is petitioners who are departing from *Bolger* by asking the Court to hold that a traditional advertisement is the *sine qua non* of commercial speech. *Bolger* at n.14. As this Court has held, commercial speech is not so neatly differentiated from noncommercial speech; often the difference "is a matter of degree." *Discovery Network*, *supra*, 507 U.S. at 423.

Nothing in *Bolger* or the court of appeals decision requires any intrusion or invasion that is inimical to the First Amendment. The Fifth Circuit stated that any relevant evidence may be used "in determining whether, as matter of fact, those who circulated the Satanism rumor via AmVox acted out of economic motivation." App 28a. Although a speaker may wish to offer evidence of his or her subjective motives — Haugen never did so in his trial testimony — the Fifth Circuit emphasized only *objective* indicia of the speaker's motivation. For example, the court of appeals deemed "Amway's unique structure" relevant to the determination on remand, including

> the fact that Amway distributors make money not simply by selling Amway products to the public, but also by recruiting other distributors into the organization, who become "downline" distributors, and upon whose sales the "upline" distributors then get commissions.

App. 27a. Moreover, even if a speaker had to answer questions about his subjective motivations in order to allow a court to make a "commercial speech" determination, that would be no more intrusive or inimical to the First Amendment than requiring him to state whether he knew his statement was false or harbored serious doubts about its truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 725-26 (1964); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n.30, 104 S. Ct. 1949, 1965 (1984). Thus, petitioners' contentions have all the trappings of a makeshift that has no relevance to the facts of this case.

C. Every Court Of Appeals That Has Addressed The Issue Has Concluded That This Court's "Commercial Speech" Analysis Applies Not Only To Direct Government Regulation Of Speech, But To Private Actions As Well.

In addition to challenging the Fifth Circuit's consideration of "economic motivation" as prescribed in *Bolger*, petitioners urge the Court to reject altogether the appellate court's application of this Court's "commercial speech" analysis to the question whether the "actual malice" standard applies in this case. They argue that the "commercial speech" analysis ought to apply only to "direct government regulation of speech" and that there is no precedent or reasonable basis for applying it in a civil action, such as one predicated on Lanham Act Section 43(a).

The only other court of appeals to consider this question — the Third Circuit in *U.S. Healthcare* — reached exactly the same conclusion as the Fifth Circuit. Both *U.S. Healthcare* and the Fifth Circuit's decision are well reasoned and well grounded in this Court's "commercial speech" jurisprudence. The Fifth Circuit opinion quoted the Third Circuit's reasoning at length on this issue, noting that

> the court "believe[d] the subordinate valuation of commercial speech is not confined to the government regulation line of cases[,]" but instead should extend to defamation and Lanham Act cases as well.

App. 17a (quoting *U.S. Healthcare*, *supra*, 898 F.2d at 932). The Fifth Circuit noted that the Third Circuit had relied on language from Supreme Court decisions stating that commercial speech " 'may be regulated in ways that might be impermissible in the realm of noncommercial expression' " and added:

> Based on this language, the *U.S. Healthcare* court concluded that the lesser protection commercial speech receives from direct government regulation also must apply to private actions for defamation and the like. We agree. If commercial speech receives less protection from government regulation, then it also should receive less protection from private suits, which are not much more likely than are government regulation to infringe on those values the First Amendment seeks to protect. Furthermore, private suits can be a form of government regulation.

App. 18a.

Petitioners fail to explain why the commercial speech analysis cannot be applied just as reasonably to private actions as it is to government regulations. To the contrary, the Fifth Circuit's and the Third Circuit's reasoning is consistent with this Court's recognition that the indirect pressures that private suits can exert are comparable to the pressures fostered by government regulations. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 625 (1984); *cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86, 108 S. Ct. 1704, 1712 (1988). The consistency of the limited precedents on this subject indicates that this case is not appropriate for further review.

II. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER WHETHER THE "ACTUAL MALICE" STANDARD APPLIES TO SPEECH PROPERLY CLASSIFIED AS "COMMERCIAL." EVERY CIRCUIT TO SPEAK TO THE QUESTION HAS HELD THAT IT DOES NOT APPLY.

Petitioners also suggest there is a controversy that this Court must resolve concerning whether the "actual malice"

standard applies to speech classified as "commercial." But this controversy proves as illusory as the others. Three courts of appeals have addressed that issue directly[12] and reached the same conclusion — it does not apply.

In addition to the Fifth Circuit's holding in this case, the Third Circuit held, in a carefully reasoned opinion, that, when false commercial speech is involved, the "heightened protection of the actual-malice standard is not 'necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.'" *U.S. Healthcare*, *supra*, 898 F.2d at 937. Recently, in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), the Ninth Circuit agreed, holding that,

> [w]hen speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice. *See Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 556 (5th Cir. 2001) ("Supreme Court precedent prevents us from importing the actual-malice standard into cases involving false commercial speech.").

Id. at 1185.[13]

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12. In *Porous Media Corp.*, *supra*, 173 F.3d at 1119-20, the Eighth Circuit avoided that constitutional issue by concluding that the predicate for applying the "actual malice" standard, the plaintiff's "public figure" status, had not been established.

13. There is no conflicting authority of equal dignity warranting this Court's intervention. The only contrary views cited by petitioners are contained in a Delaware superior court opinion and a Maryland district court opinion (Petition, p. 24), which the Fifth Circuit acknowledged but did not follow, concurring instead with the Third Circuit's decision in *U.S. Healthcare*. App. 31a-33a.

It is significant that the Third, Fifth, and Ninth Circuits all reached that conclusion in the Lanham Act context, Section 43(a) of which proscribes false or misleading "commercial speech." *Seven-Up Co. v. Coca-Cola, Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996) (Section 43(a) applies only to "commercial speech").[14] This Court consistently has held that commercial speech must be truthful to qualify for full First Amendment protection. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, *supra*, 447 U.S. at 566; *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 1925 (1999). In fact, the Lanham Act's legislative history makes clear that the Act purposely was drafted to apply only to false or misleading commercial speech, in order to avoid infringing First Amendment rights.[15] *Seven-Up*, *supra*, 86 F.3d at 1383-84 n.6. Not only is the "breathing space" provided by the "actual malice" standard unnecessary in this context, applying it when large corporate plaintiffs such as P&G assert Section 43(a) claims would radically alter practice under the Lanham Act, severely limiting access to its protections.[16]

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14. In considering whether or not to apply the "actual malice" standard to P&G's Lanham Act claim, the district court concluded that the 1995 Haugen AMVOX message satisfied the definition of "commercial speech." T.T. 2263.

15. *See* 134 Cong. Rec. 31,851 (Oct. 19, 1988) (statement of Rep. Kastenmeier) (Lanham Act "specifically extends only to false and misleading speech that is encompassed within the 'commercial speech' doctrine of the United States Supreme Court"); 135 Cong. Rec. H1216-17 (daily ed. Apr. 13, 1989) (statement of Rep. Kastenmeier) ("[T]he proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material . . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech.").

16. In that event, the courts quickly would be faced with (Cont'd)

III. CONSIDERATION OF THE ISSUES PRESENTED IN THE PETITION BY THIS COURT WOULD BE BOTH PREMATURE AND INAPPROPRIATE. FURTHER PROCEEDINGS IN THE DISTRICT COURT MIGHT OBVIATE THE NEED FOR DECIDING THOSE ISSUES.

In light of the Fifth Circuit's reversal of the *res judicata* ruling, the district court will revisit the level of proof that P&G must present in order to establish its Lanham Act claim.[17] The Fifth Circuit held that the record on the elements

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(Cont'd)
applying the "actual malice" standard not only in all civil actions based on false advertising, but also in governmental proceedings involving regulation of false advertising, including Federal Trade Commission proceedings.

17. No matter how this Court might resolve the "actual malice" issue presented by petitioners, further district court proceedings are inevitable and should provide further factual development and judicial analysis by the two courts below. This is due to the unique procedural history of this case and its present posture. At trial, P&G sought to hold Haugen and Walker *directly* liable for disseminating the Satanism rumor, and to hold Amway and all the high-level distributor defendants (including Haugen and Walker) *vicariously* liable for the dissemination of the Satanism rumor by their "downline" distributors. The district court ruled that the "actual malice" standard applied to both of those liability theories. T.T. 2274. At the close of P&G's case, petitioners moved for JML on P&G's Lanham Act claim, arguing that P&G had failed to prove Amway's, Haugen's, and Walker's actual malice. The district court disagreed and denied JML, T.T., p. 2307 ("actual malice has been established by the evidence"), but later held that *res judicata* barred any *direct* Lanham Act liability against Amway, Haugen, and Walker. T.T. 2766. With direct liability out of the picture, the court granted JML based on P&G's purported failure to prove actual malice by non-defendant "downlines," which it deemed necessary to hold Amway, Haugen, and Walker *vicariously* liable for the
(Cont'd)

of "commercial speech" was not sufficiently complete to allow it to determine whether the "actual malice" standard applies. Its decision contemplates that the district court will make that determination based on evidence adduced thus far and whatever additional material is presented on remand. App. 27a-28a.

Thus, the constitutional issues framed in the current petition are not, and may never become, ripe in this case. If they do prove to be relevant, a fuller record will have been developed on such critical matters as the speaker's economic motivation and the other characteristics of "commercial speech" and the views and analyses of the district court and the Fifth Circuit will be available to this Court. It is only when that process is completed that certiorari should be sought.[18] *Spector Motors Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944); *Wood v. Georgia*, 450 U.S. 261, 264-65, 101 S. Ct. 1097, 1100 (1981); *Youakim v. Miller*, 425 U.S. 231, 236, 96 S. Ct. 1399, 1402 (1976).

(Cont'd)
Satanism rumor. *Id.* at 2838-39. Because the Fifth Circuit properly reversed the *res judicata* ruling, App. 13a, and defendants' petition does not challenge that part of the court of appeals decision, the district court's JML could not be affirmed, even if this Court were to entertain and validate defendants' "actual malice" argument. At best, the Court would be granting review merely to prescribe the standard of proof that P&G would have to satisfy on remand.

18. In what may be a last-gasp attempt to entice the Court to intervene, petitioners allude to "an intermediate level of protection between 'actual malice' and strict liability." Petition, p. 26. Because petitioners did not argue for such a standard before the district court or the court of appeals, it would be inappropriate for this Court to address it. *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2001 WL 703953 (2001).

IV. BECAUSE THIS CASE INVOLVES AN EXTRAORDINARILY UNUSUAL FACTUAL SITUATION UNLIKELY TO BE REPLICATED, THE COURT SHOULD NOT ADDRESS PETITIONERS' PLEA TO ABANDON THE "COMMERCIAL SPEECH" DOCTRINE.

Petitioners assert that the "actual malice" standard should be applied whenever the speech concerns a public figure and touches on "a matter of public concern," regardless of the message's commercial nature. Petition, p. 20.[19] They implicitly concede there is no disagreement among the circuits on this issue, but contend that its importance alone justifies granting certiorari. In essence, petitioners are asking the Court to overrule *Central Hudson*, *Bolger*, and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 105 S. Ct. 2265 (1985), insofar as they held that speech of a commercial nature is not entitled to full constitutional protection merely because it is tied to an issue of public concern. *Central Hudson*, *supra*, 447 U.S. at 563 n.5; *Bolger*, *supra*, 463 U.S. at 68; *Zauderer*, *supra*, 471 U.S. at 637 n.7; App. 35a (quoting the Tenth Circuit's holding in *P&G v. Haugen*, *supra*, 222 F.3d at 1275).

Petitioners suggest that the AMVOX message warrants full constitutional protection because, when Haugen and others maligned their competitor as a devil worshipper, they were addressing "a matter of public concern" and their speech should be protected on that basis alone. The extraordinarily unusual factual setting in this case and the necessity for a remand to develop the factual record make this an inappropriate vehicle for considering such a radical departure

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19. The complaint alleged both Lanham Act Section 43(a) claim and a common law defamation claim. The district court granted JML on the defamation claim, but not because P&G failed to establish actual malice.

from the "commercial speech" doctrine. It would make the difficult task of fashioning a workable definition for "matters of public concern" that much more so.

Consider, for example, the "content, form, and context" test from *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762, 105 S. Ct. 2939 (1985),[20] applied to these facts. Although petitioners strain hard to emphasize the "religious" content of the AMVOX message, Petition, p. 17, its chief focus was on purely private commercial considerations.[21] It exhorted Amway distributors to "buy all the products that we want from our own shelf," namely, Amway products. T.E. 19. Stated conversely: "Don't buy from Satan." It referred to "business" four times, "products" three times, "buy" or "buying" three times, but did not mention "God" at all. *Id.* It did not even make an appeal to listeners' belief in, or loyalty to, a deity. Rather, it was an overt call for *brand* loyalty — to Amway. The message even closed with a classic Madison Avenue clincher:

> I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from.

Id.

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20. *Dun & Bradstreet*, 472 U.S. at 761 (requiring case-by-case appraisal of the expression's "content, form, and context . . . as revealed by the whole record" in order to determine if it addresses a public issue).

21. Amway has publicized AMVOX as a business tool capable of assisting distributors in "messaging the dream."

Nevertheless, attempting to cast Haugen as a sort of Thomas Aquinas-*cum*-Thomas Paine, petitioners characterize his dissemination of the message as an act of conscience based on religious conviction. Yet, Haugen admitted he listened to the incoming message while running on his treadmill and "it sold me," T.T. 1822-23, so he dispatched it to his "downlines" using a voicemail delivery function that automatically told all recipients, "Listen to it" and "Double your numbers." T.E. 19. Those facts, coupled with petitioners' contention that Haugen intended it only for a small "intracorporate" group[22] (Petition, p. 15; T.T. 1772), contradict their suggestion that he was contributing religious thought to a public debate.

Whatever its intended distribution might have been, there is no question how the message was received — as a matter of commercial, not religious, significance to Amway distributors. MSJ Opp. Exh. A5 (distributor forwarded it with the message "I think it would benefit everybody"). Even an internal Amway document admitted that

> Amway distributorships have chosen to play upon the public's religious beliefs and superstitions in what must be seen as an attempt to affect their buying decisions.

MSJ Opp., Exh. A36; *see also* MSJ Opp., Exhs. A3, A4; T.E. 1537 (Amway's Satanism flier, instructing consumers: "Stop buying Procter & Gamble products," and "We offer you an alternative.").

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22. That Haugen intended the message for his "downlines" or even a small subset of them does not detract from its commercial character. As the Fifth Circuit noted, these are the individuals upon whom he depends for his commissions. App. 27a; *see also* footnote 10, *ante*.

Even if the Court were inclined to consider whether all expression on issues of public concern should have constitutional protection regardless of its predominantly commercial nature, it would face the task of defining issues of public concern, a task whose difficulty the Court already has compared with that of defining "commercial speech." *Dun & Bradstreet*, *supra*, 472 U.S. at 762 n.8.[23] The extraordinarily unusual facts of this case, which are not yet fully developed and unlikely to be replicated, simply are not a proper context in which to open that Pandora's box.

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23. *See, e.g.*, *Bolger*, *supra*, 463 U.S. at 68 n.15 and cases cited therein ("public issues" were defined as "those 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period' " [internal citations omitted]). One court of appeals predicted before *Central Hudson*, *Bolger*, and *Zauderer* that, if constitutional protection for speech of a commercial nature depended on whether it addressed a public issue, advertisers could be expected to append phrases like "Brought to you in the public interest" to ads in order secure that protection. *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, *supra*, 570 F.2d at 163; *see also Bad Frog Brewery v. New York State Liquor Authority*, *supra*, 134 F.3d at 97 (addressing the contention that a beer label displaying a frog "giving the finger" is, in part, "political, or at least societal, commentary").

CONCLUSION

For the foregoing reasons, P&G respectfully requests that the Petition be denied.

Respectfully submitted,

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